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IN THE

# Supreme Court of the United States

October Term, 1952.

No. 553

BENJAMIN L. SMITH and
MICHAEL J. GAUL,
*Petitioners,*

*v.*

STEAMSHIP "MORMACDALE" and
STEAMSHIP "ROBERT LUCKENBACH",
*Respondents.*

## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## TABLE OF CONTENTS.


| | Page |
|---|---|
| THE OPINIONS OF THE COURT BELOW | 1 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT OF THE MATTER INVOLVED | 2 |
| SPECIFICATION OF ERRORS TO BE URGED | 3 |
| REASONS RELIED UPON FOR ALLOWANCE OF THE WRITS OF CERTIORARI | 4 |
| 1. The Decision Below Raises Serious Doubt as to the Constitutionality of the Longshoremen's and Harbor Workers' Compensation Act | 5 |
| 2. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court, and Has Decided It in a Way Probably in Conflict With Basic Principles of the Maritime Law | 7 |
| (a) Under the American Maritime Law the Vessel Is a Juridical Entity Separate and Distinct From Her Owner, and as Such, Is an Independent Source of Jurisdiction, Liability and Recovery, Regardless of the Status of Her Owner | 7 |
| Jurisdiction Against a Vessel in Rem | 8 |
| Responsibility of a Vessel for Its Own Torts Regardless of Other Possible Concurrent Liabilities | 9 |
| (b) By Enactment of the Longshoremen's Act, Congress Did Not Affect Rights and Liabilities Arising Outside of the Employer-Employee Relationship | 13 |
| CONCLUSION | 21 |
| ADDENDUM | 23 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Bernatowicz v. Nacirema Operating Co., 142 F. 2d 385 | 21 |
| Case v. Pillsbury, 148 F. 2d 392 | 18 |
| China, The, 7 Wall. 53 | 10 |
| Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598 | 5, 6, 7, 13 |
| Explorer, The, 20 Fed. 135 | 12 |
| Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239 | 21 |
| General de Sonis, The, 179 Fed. 123 | 12 |
| Hitaffer v. Argonne Co., 183 F. 2d 811 (C. A. D. C.) cert. den. 71 S. Ct. 80 | 21 |
| Little Charles, The, 25 Fed. Case 979, 982 | 10 |
| Lord Derby, 16 Fed. 265 | 12 |
| Malek Adhel, 2 How. 210, 234 | 10 |
| Pacific Pine, The, 31 Fed 2d 152 | 12, 19, 20 |
| Plamals v. The Pinar Del Rio, 277 U. S. 151, 72 L. Ed. 827 | 4, 15, 20 |
| Pursglove v. Juanita, 93 U. S. 337, 23 L. Ed. 930 | 12 |
| Rederii v. Jarka Corporation, 26 F. Supp 304, 305 | 19 |
| Rupert, The, 213 F. 263 | 10 |
| Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099 | 12, 17, 19, 20, 22 |
| Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 83 L. Ed. 265 | 21 |
| Southern S. S. Co. v. Norton, 101 F. 2d 825 | 21 |
| Terminal Shipping Co. v. Branham, 47 F. Supp. 561, aff'd 136 F. 2d 655 | 18 |
| Ticonderoga (Swabey, 215, 217) | 10 |
| Wanderer, The, 20 Fed. 140 | 12 |

## TABLE OF STATUTES AND RULES CITED.


| | Page |
|---|---|
| Admiralty Rules, 10, 14 | 8 |
| Carriage of Goods by Sea Act, April 16, 1936, C. 229, 49 Stat. 1207 et seq., 46 U. S. C. Sec. 1300 et seq. | 16 |
| Jones Act, 46 U. S. C. A. Sec. 688 | 4, 15, 20 |
| Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq. 2, 3, 4, 5, 13, 15, | 17, 18, 20, 23 |
| McKinney's New York Workmen's Compensation Law, 64 Part 1; McKinney's Consolidated Laws, Sec. 11 | 23 |
| Rules of the Supreme Court of the United States, Rule 38, par. 5 (b) | 2 |
| Suits in Admiralty Act, March 9, 1920, C. 95, 41 Stat. 525, 46 U. S. C. Secs. 741-752 | 16, 17 |
| 28 U. S. C. Section 1254 (1) | 2 |


## TEXTS CITED.


| | Page |
|---|---|
| 1 Benedict on Admiralty: | |
| Secs. 11, 12 | 8 |
| Pages 17-18 | 9 |
| Page 24 | 10 |
| 3 Black Book of Admiralty, 103 | 8 |
| Holmes, "The Common Law", Little, Brown and Company, 1938 | 8, 10, 11, 15, 18 |
| Price, "Law of Maritime Liens", Sweet & Maxwell, Limited (London) 1940 | 8, 9, 10, 12 |

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OCTOBER TERM, 1952.

No. .

BENJAMIN L. SMITH AND MICHAEL J. GAUL,
*Petitioners,*

*v.*

STEAMSHIP "MORMACDALE" AND STEAMSHIP "ROBERT LUCKENBACH",
*Respondents.*

## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioners, Benjamin L. Smith and Michael J. Gaul, respectfully pray that writs of certiorari issue to review the final judgments of the United States Court of Appeals for the Third Circuit entered on July 17, 1952 in appeals docketed in said Court as No. 10,700 (appeal by petitioner, Smith) and No. 10,701 (appeal by petitioner, Gaul).

### The Opinions of the Court Below.

The Opinion of the District Court was filed on September 24, 1951 and is reported in 99 F. Supp. 584. The Opinion of the Court of Appeals was filed on July 17, 1952 and is reported in 198 F. 2d 849, appearing at R. 17-20.

**Jurisdiction.**

These are proceedings within the admiralty and maritime jurisdiction of the United States and of this Honorable Court and involve claims for damages for personal injuries arising under the general maritime law.

The judgments of the Court of Appeals were entered on July 17, 1952 (R. 20, 21). Petition for rehearing, timely filed, was denied on September 22, 1952 (R. 22). The time within which to file the present petition was extended by Mr. Justice Burton to and including January 16, 1953 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) and Rule 38, par. 5 (b) of the Rules of the Supreme Court of the United States.

**Question Presented.**

Does the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 et seq., 33 U. S. C. A. Sec. 901 et seq., destroy an injured longshoreman's traditional maritime right to proceed in rem for damages against the offending vessel merely because his employer is the owner of the vessel?

**Statement of the Matter Involved.**

These cases are actions in rem against respondent vessels only, brought by the petitioners, longshoremen, to recover damages for injuries due to unseaworthy conditions of the respondent vessels as well as negligence of the crews.

The Luckenbach Steamship Company, Inc., and the Moore-McCormack Lines, Inc., each owns and operates a fleet of vessels, and, independent of that business, each operates a stevedoring business in the port of Philadelphia. Petitioner Smith was engaged as a longshoreman by Moore-McCormack Lines, Inc. to work cargo on respondent vessel "Mormacdale", while petitioner Gaul was engaged by the Luckenbach Steamship Company, Inc. to work cargo on respondent vessel "Robert Luckenbach". Each man was in-

jured aboard his respective vessel while so engaged in the course of his duties.

The District Judge summarily dismissed both actions upon the ground that each was "in fact brought against the ship's owner and Libellant's employer and such suit is barred by the provisions of the Longshoremen's and Harbor Workers' Compensation Act" (99 F. Supp. 584). On appeals to the United States Court of Appeals for the Third Circuit the Orders of dismissal were affirmed upon substantially the same grounds relied upon by the District Court.

**Specification of Errors to Be Urged.**

The Court of Appeals erred in the following respects:

1. In construing the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq. in a way which raises serious question as to its constitutionality, by holding that the Act affects rights and liabilities outside of the employer-employee relationship.

2. In refusing to recognize that a vessel is, under the maritime law, a separate and distinct juridicial entity, by holding that a libel against a vessel in rem is in fact a suit against the shipowner.

3. In holding that Congress, by enactment of the Longshoremen's Act, intended to destroy the then existing maritime rights of injured longshore workers to libel offending vessels for the recovery of damages.

4. By failing to hold that an offending vessel is a "third person" against which, under Section 33 of the Longshoremen's Act, the right of an injured longshore employee to proceed for the recovery of damages is expressly reserved.

**Reasons Relied Upon for Allowance of the Writs of Certiorari.**

The petition should be granted because:

(a) The Court of Appeals for the Third Circuit has decided an important federal question in conflict with applicable decisions of this Court. In *Plamals v. The Pinar Del Rio,* 277 U. S. 151, 72 L. Ed. 827, this Court held that the Jones Act (46 U. S. C. Sec. 688), which is limited to the employer-employee relationship and creates for seamen an in personam action against the employer-shipowner, cannot be extended to include an in rem action against the offending vessel because no maritime lien is expressly created by that Act. The Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. Sec. 901 et seq.) is likewise limited to the employer-employee relationship and it likewise is restricted to the creation of an in personam (compensation) liability against the employer. The Act negatives any intent either to create a lien against the offending vessel for compensation liability, or to destroy the existing in rem liability of an offending vessel for indemnity damages. Under the doctrine of the *Pinar Del Rio,* the Compensation Act must be limited in its effect to the in personam liability of the employer, and may not be held to affect the in rem liability of an offending vessel.

(b) The Court of Appeals for the Third Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court.

(c) The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

(d) The decision below raises serious question as to the constitutionality of important federal legislation involving the rights of maritime workers.

(e) The decision below is in conflict with basic principles of the maritime law.

1. THE DECISION BELOW RAISES SERIOUS DOUBT AS TO THE CONSTITUTIONALITY OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Under the decision of this Court in *Crowell v. Benson,* 285 U. S. 22, 76 L. Ed. 598, the existence and involvement of the employer-employee relationship is vital to the constitutional validity of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 et seq., 33 U. S. C. Sec. 901 et seq. Absent such relationship the Act can have no application and therefore cannot serve either to create new rights or to wipe out existing maritime liabilities.

> "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon navigable waters of the United States, they fall outside the jurisdiction . . . Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations . . . In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, *the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment.*" *Crowell v. Benson, supra,* at U. S. pp. 55-56.

Yet by its present decision the Court below, without a determination that the *employer-employee* relationship in fact existed between petitioners and the respective respondent *vessels,* nevertheless called into play the provisions of the Act to destroy the ancient, universally recognized in rem liability of a vessel for damage caused by its unsea-

worthiness. This was accomplished by the rationale that the Congressional intent was to limit the employer's liability to his employees to the remedy provided by the Act, that where the vessel is the property of the employer recourse against the ship is in fact recourse against the employer, and that to permit such result would distort the intent of Congress. The soundness of this approach, insofar as it concerns the construction of the Act in its maritime context, will be discussed in a later section of the Petition. Suffice it to say at this juncture that assuming its validity (absent constitutional considerations) it must yield in the face of constitutional sanctions. In brief, no matter by what road and by what plausible rationale the result is achieved, it must be stricken down if the Constitution forbids it.

It is our position that if in fact the Congressional intent is what the Court below declares it to be, there is, at the least, a serious doubt of constitutionality raised.

> "When the validity of an act of Congress is drawn into question, and even if a *serious doubt* of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson, supra,* at U. S. p. 62.

The Court below has made no determination that under the language and intent of the Act respondent *vessels* were in fact petitioners' *employers.* But under the doctrine of *Crowell v. Benson, supra,* it is a function and duty of the Court to make such a determination before it can permit the Act to alter maritime rights and liabilities, for upon such a determination hinges "the proper exercise of the judicial power of the United States in enforcing constitutional limitations." *Crowell v. Benson, supra,* at U. S. p. 58. Nor has the Court below considered whether such a determination may validly be made, assuming that the legislative intent

is clear. Whatever may be said of other cases, the cases at bar may not be decided upon purely practical consideration, for the very reason that grave constitutional questions are inherent and may not be ignored. The provisions of the Act "clearly evidence the intention of the Congress that any implication from the terms of the Act which would render them invalid should not be indulged." *Crowell v. Benson, supra,* at U. S. p. 63. We respectfully submit that consideration of these constitutional questions is vital and may not be ignored.

2. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court, and Has Decided it in a Way Probably in Conflict With Applicable Decisions of This Court, and in Conflict With Basic Principles of the Maritime Law.

Whether or not the construction, placed upon the Longshoremen's Act by the Court below, is in accord with the Congressional intent must be determined by an analysis of the Act in its maritime context. The point of beginning is the basic question whether, under the maritime law, respondent vessels are separate and distinct juridical entities, independent of the personalities of their owners, for if in fact respondents are not the alter egos of the owners, then the basic premise upon which the decision below turns is destroyed and the result reached becomes untenable.

(a) *Under the American Maritime Law the Vessel is a Juridical Entity Separate and Distinct from Her Owner, and, as such, is an Independent Source of Jurisdiction, Liability and Recovery, Regardless of the Status of Her Owner.*

American maritime law has traditionally recognized the vessel as a personality, independent and exclusive of its owners or operators. It is so completely a separate and

distinct juridical entity that it may be sued, held liable, and financially answerable, regardless of the legal status of its owners or operators. The admiralty authorities are clear and abundant to illustrate this independent juridical existence of the vessel in all major phases of litigation, namely:

(a) Jurisdiction in rem for civil purposes;

(b) Liability of the vessel in rem;

(c) Execution against the vessel for satisfaction of any judgment;

all regardless of the legal responsibility of the shipowner.

JURISDICTION AGAINST A VESSEL IN REM.

The suability of a vessel by process in rem is so well established that citations of authority seem almost superfluous. As observed by Mr. Justice Holmes in his treatise "The Common Law", (p. 34):[1]

> "The principles of the admiralty are embodied in its form of procedure. A suit may be brought there against the vessel by name, any person interested in it being at liberty to come in and defend, but the suit, if successful, ending in a sale of the vessel and a payment of the plaintiff's claim out of the proceeds. As long ago as the time of James I it was said that 'the libel ought to be only against the ship and goods and not against the party.' (Citing Godbolt, 260)".

That the vessel may be sued without joining the owner, see Admiralty Rules 10, 14; 1 Benedict on Admiralty, Sections 11, 12. It is a common practice to sue the vessel in rem when its foreign owner is not subject to the jurisdiction and even where the owner has no personal liability as in the case of a chartered vessel. Holmes, The Common Law, p. 29 (Citing 3 Black Book of Admiralty 103); Price, Law of

1. Little, Brown and Company, 1938.

Maritime Liens, p. 23.[2] Thus we have in the vessel a legal entity capable of being sued alone, irrespective of whether or not the shipowner is subject to the Court's jurisdiction.

The basis of the suit in rem is the maritime lien, but, as will be shown in the next section, the maritime lien in America is a unique principle of the admiralty law, and unlike any common law lien, is based fundamentally on the individual responsibility of the vessel for its tort, and not on procedural convenience.

RESPONSIBILITY OF A VESSEL FOR ITS OWN TORTS REGARDLESS OF OTHER POSSIBLE CONCURRENT LIABILITIES.

The responsibility of a vessel for its own tort is exclusive and independent of other possible concurrently responsible parties.

This principle is explained through the historical development of the maritime lien in America. Benedict states:

> "The doctrine of the personality of the ship may be described as a fiction, *but the fiction is rather in the mode of expression, than in the substance of the law.* The principle is that one . . . who through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, *an enforceable interest in the ship.* (Citing Kruass Bros. Lumber Co. v. The Pacific Cedar, 290 U. S. 117, 78 L. ed. 216; 54 Sup. Ct. 105) . . . . *The ship is so much an independent enterprise, a juridical aggregate of rights and liabilities* that her creditors virtually go shares in her; . . A maritime lien is the necessary basis for every admiralty proceeding in rem. *Such a lien is a right of property and not a mere matter of procedure:*" 1 Benedict on Admiralty, pp. 17-18. (Emphases supplied.)

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2. Sweet & Maxwell, Limited (London), 1940.

> "Maritime liens differ from common law liens in a very important point. A common law lien is always connected with a *possession* of the thing: it is simply a right to retain. On the other hand, a maritime lien does not in any manner depend upon possession. *It is a right affecting the thing, and giving a sort of proprietary interest in it, and a right to proceed against it, to recover that interest.*" 1 Benedict on Admiralty, p. 24. (Emphases supplied.)

The independent liability of the ship is further evidenced by the fact that "a maritime lien adheres to the property into whose hands so ever it may pass. . . ." 1 Benedict on Admiralty, p. 25; *The Rupert*, 213 F. 263; Price, Law of Maritime Liens, p. 3.

Mr. Justice Holmes drew from the case of *Ticonderoga* (Swabey, 215, 217) to illustrate the liability of a vessel under charter for collision damages *even though the vessel owner could not be held liable for said damages*, and from *The China*, 7 Wall. 53 wherein this Court held the vessel liable for collision damage even though she was under the control, not of her owner, but of a pilot whose employment was compulsory under the laws of the port.[3]

By way of further illustration of the ship's personality, Justice Holmes cites the language of Chief Justice Marshall in *The Little Charles*, 26 Fed. Case 979, 982, quoted with approval by Justice Story in *Malek Adhel*, 2 How. 210, 234:

> "*This is not a proceeding against the owner, it is a proceeding against the vessel for an offense committed by the vessel;* which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of

3. "The English Court probably would have decided otherwise and the matter is settled in England by legislation. But there the Court of Appeal, the Privy Council, have been largely composed of common law lawyers, and it has shown a marked tendency to assimilate common-law doctrine." *Holmes, supra*, 27-28.

> the owner. It is true that inanimate matter can commit no offense. *But this body is animated and put in action by the crew,* who are guided by the Master. *The vessel acts and speaks by the Master.* She reports herself by the Master. It is, therefore, not unreasonable that the vessel should be affected by this report. . . . *The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing.*" *Holmes, supra,* p. 29. (Emphasis supplied.)

As Mr. Justice Holmes states: ". . . those great judges, although of course aware that a ship is no more alive than a millwheel, thought that not only the law did in fact deal with it *as if it were alive,* but that it was reasonable that the law should do so. The reader will observe that they do not say simply that it is reasonable on grounds of policy to sacrifice justice to the owner to security for somebody else, but that *it is reasonable to deal with the vessel as an offending thing*" (*Holmes, supra,* pp. 29-30).

> "By the Maritime Law of the Middle Ages the ship was not only the source, but the limit, of liability (citing Customs of the Sea, C. 27, 141, 192 in 3 Black Book of the Admiralty 103, 243, 345). . . . In the most ancient source of the maritime Law now extant, . . . the statement is that the mariners will lose their wages when the ship is lost." (Citing from 2 Black Book 213—Judgment of the Sea, et al.) *Holmes, The Common Law,* pp. 29-31.

Mr. Justice Holmes completes his illustrations of the liability of the vessel for its contracts and torts, regardless of personal liability, by reference to the cases of freight and salvage claims binding the vessel, though such claims could not support action in personam at common law (*Holmes, supra,* pp. 32-33).

The British authorities are in accord: "The United States Courts have recognized the ship as an entity with a

personality of its own" (*Price, supra,* 11). "In English Law, however, the property is arrested in accordance with the procedural theory in order to compel the appearance of the owner, whereas in American law the ship itself is sued as the guilty thing" (*Price, supra,* 115).

> "The outstanding difference between the two systems lies in their conception of the nature of the maritime lien. *In the United States the personification theory prevails . . . The personification theory regards the ship as a juridical entity. . . . It follows that a maritime lien exists regardless of whether the owner is personally liable, and that the lien is not destroyed by a change in ownership.* Whether the conception was derived from the Civil Law of Rome or the medieval law of Deodand is uncertain, *but the notion of the personality of the ship is definitely established in American law.*" *Price, supra,* 118. (Emphasis supplied.)

A maritime lien attaches to the vessel in cases of personal injury as well as in cases arising out of property damage. *The General de Sonis,* 179 Fed. 123; *The Pacific Pine,* 31 Fed. 2d 152 (cited with approval in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099). The question of recovery for personal injury was early raised in the *Lord Derby,* 16 Fed. 265, wherein the pilot recovered for personal injuries sustained on the vessel by action in rem. See also *Pursglove v. Juanita,* 93 U. S. 337, 23 L. Ed. 930; *The Explorer,* 20 Fed. 135; *The Wanderer,* 20 Fed. 140.

In summary, under the American Maritime law, a lien attaches against the vessel in cases of personal injury resulting from the vessel's torts, and the vessel itself is the responsible personality and held accountable for the damages. This liability arises independently of any liability of the owner and is not dependent upon or related to that liability; nor is it dependent upon either the relationship of the

owner to the offending vessel or the relationship of the owner to the injured party.

(b) *By Enactment of The Longshoremen's Act, Congress Did Not Affect Rights and Liabilities Arising Outside of the Employer-Employee Relationship.*

The employer-employee relationship being vital to the Constitutional validity of the Longshoremen's Act (*Crowell v. Benson, supra*) it must be recognized that rights and liabilities falling beyond the sphere of that relationship were not intended to be disturbed by Congress, and that no such intent should be read into the Act unless no other rational conclusion is possible. Yet the Court below, by its present decision, accomplishes just such a result in the face of compelling reasons to the contrary.

The nub of the Court's motivation is the notion that collection of damages out of the ship is an indirect way of collecting from the owner-employer; the Court finds such a notion unacceptable as a distortion of Congressional intent. Says the Court (R. 19): "To impose this additional liability on the employer when he is also shipowner would radically distort the intent of Congress in enacting the Longshoremen's Act". The fundamental fallacy of this approach is the failure to recognize that it is *the existing maritime law* which imposes in rem liability, and that unless the Act can be construed as having *destroyed* such liability, it must be recognized as valid and subsisting.

That the ship is, under the general maritime law, a distinct juridical entity, answerable for its own torts, should hardly have been open to question at this late date. Yet the Court below refuses to recognize the full implications of this concept. Because Justice Holmes characterizes the personification of an inanimate object as "metaphysical confusion", the Court below misreads into the characterization a call to arms for its destruction, and views the independent

personality of the ship as a "mere convenient conceptual tool" (R. 19). Yet nothing is further from Justice Holmes' philosophy. The whole thesis of the first thirty-eight pages of "The Common Law", insofar as it deals with the ship as a juridical entity, is summed up in the following:

> (pp. 26-27) *"A ship is the most living of inanimate things* . . . And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law *applied with even more striking thoroughness in the Admiralty.* It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, *and on that supposition they at once become consistent and logical."* (Emphasis supplied.)

In brief, Justice Holmes, far from calling for a destruction of the concept of the ship's independent personality, urges an understanding and recognition of its historical role in the development and modern application of the maritime law. Without such understanding the maritime law is arbitrary and unintelligible; with it, it becomes consistent and logical. The term "metaphysical confusion" he uses simply as an objective, descriptive label, by which he means the personification of a physically inanimate object. The characterization is accurate but it nowhere implies what the Court below has erroneously read into it.

It is the very failure of the Court of Appeals to give full scope and recognition to the personification principle (contrary to Justice Holmes' precept) that created the obstacle to a proper determination of the pending cases, by making as seemingly arbitrary what is in fact consistent and rational. For in the maritime law the maritime lien is not a device for collection from the owner; it is not a mere "convenient conceptual tool" to accomplish by indirection what the law would otherwise forbid. *The existence of a*

*maritime lien in no sense depends upon the personal liability of the owner; a proceeding against the ship is not a proceeding against its owner.*[4] Just as it cannot be brought into being by the mere statutory creation of an in personam cause of action against the owner (*Plamals v. The Pinar Del Rio,* 277 U. S. 151, 72 L. Ed. 827), so it may not be destroyed by the mere statutory substitution of one species of *in personam* liability for another, that is, compensation liability in the place of indemnity damages. Adherence to the view that any relationship whatever exists between the two is historically incorrect and judicially unsound. Nor does it reflect Congressional intent.

In *Plamals v. The Pinar Del Rio, supra,* a seaman injured in the service of his vessel brought an action in rem, claiming the benefit of the Jones Act (46 U. S. C. 688). This Court held that the Jones Act was intended to impose liability against the *employer in personam* only, and not to create a cause of action in *rem* against the *vessel* because the Act did not expressly create any lien against an offending vessel, and no such lien could be presumed. The in rem suit against the vessel brought under the Jones Act was therefore dismissed.

The Longshoremen's and Harbor Workers' Compensation Act is likewise expressly limited to the employer-employee relationship. The Act does not create a lien against an offending vessel for compensation liability; no case on record has undertaken to impose such liability. Consistent with the doctrine of the *Pinar Del Rio,* federal legislation affecting the rights of maritime workers must be construed in the light of the maritime doctrine which recognizes to the fullest extent the independent personality of the ship as a distinct juridical entity. So viewed, the Longshoremen's Act neither creates new rights against the *vessel,* nor does it destroy existing rights.

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4. Holmes, "The Common Law", 27-29.

It is not to be assumed that Congress, when dealing with maritime subjects, is unaware of the unique characteristics of the maritime law. Quite the contrary assumption should be made, if assumptions are to be indulged. But in point of fact existing legislation clearly demonstrates that the maritime lien is not unfamiliar to our national legislators, and that where the intent has been to abrogate it, Congress has done so in specific terms and in words of unmistakable import. A perfect illustration is to be found in the Carriage of Goods by Sea Act, April 16, 1936, C. 229, 49 Stat. 1207 et seq., 46 U. S. C. Sec. 1300 et seq., in which Congress, recognizing that a vessel is a distinct juridical entity, has either abrogated or limited, *in specific terms,* not only the liability of the carrier-shipowner, *but the liability of the vessel itself,* for loss or damage arising under designated conditions.[5]

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5. 46 U. S. C. Sec. 1304:

"Rights and immunities of carrier *and ship*—Unseaworthiness.

"(1) Neither the carrier *nor the ship* shall be liable for loss or damage arising or resulting from unseaworthiness unless . . . etc.

• • •

"(2) Neither the carrier *nor the ship* shall be responsible for loss or damage arising or resulting from . . . etc.

• • •

"(5) Neither the carrier *nor the ship* shall in any event be or become liable for any loss or damage . . . in an amount exceeding $500. per package . . .

• • •

"Neither the carrier *nor the ship* shall be responsible . . . for loss or damage to . . . goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading." (Emphasis supplied.)

A somewhat analogous illustration is to be found in the Suits in Admiralty Act, March 9, 1920, C. 95, 41 Stat. 525,

There is no comparable language in the Longshoremen's Act; nothing contained therein even remotely intimates any similar purpose on the part of Congress. Neither a literal reading of the Act, nor a consideration of the spirit in which it was framed or the objects which it sought to achieve will justify the view that the traditional liability of an offending vessel, as distinguished from the liability of her owner-employer, was in any sense disturbed by its enactment.

The Longshoremen's Act is not a limitation of liability statute. It was not designed to broaden the immunity of the employer. Consistent with the philosophy behind workmen's compensation schemes, it is predicated upon what the Congress believed was a fair exchange of then existing rights and liabilities of maritime employers and employees for the rights and liabilities provided by the Act, with the emphasis, as respects fairness and liberality, in the direction of the employee.[6] There is absolutely no warrant for the view that the employee was to throw into the bargain as well as rights not dependent on the employer-employee relationship; rights which shoreside employees never had and therefore were never forced to give up when brought under comparable compensation laws. It must not be forgotten that the Longshoremen's Act was modeled after McKinney's New York Workmen's Compensation Law. (*Case*

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46 U. S. C. Secs. 741-752, which immunized from attachment government owned vessels:

46 U. S. C. Sec. 741.

"Exemption of United States Vessels and cargoes from arrest or seizure.

"No vessel owned by the United States . . . shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

6. "It is in relation to liability for personal injury or death arising in the course of his employment aboard the ship that the policy of our law has been most favorable to the stevedore's claim." *Seas Shipping Company v. Sieracki*, 328 U. S. 85 at p. 98 footnote 16, 90 L. Ed. 1099, 1108.

*v. Pillsbury*, 148 F. 2d 392; *Terminal Shipping Co. v. Branham*, 47 F. Supp. 561, aff'd 136 F. 2nd 655). There is nothing equivalent to the maritime lien in the common law and therefore the draftsmen of the New York Act could not have intended, by its language, to substitute compensation for anything other than the common law liability of the employer. How can it be supposed that, by the use of virtually identical language [7] Congress intended to accomplish what the New York legislature could not possibly have contemplated?

Quite the contrary. The Longshoremen's Act specifically recognizes and preserves the employees' existing right to recover damages against juridical entities other than the employer. Section 33(a) (33 U. S. C. A. Sec. 933(a)) provides:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person *other than the employer* is liable in damages, he may elect . . . to receive such compensation *or to recover damages against such third person.*"

We do not believe that this section is essential to the preservation of third party actions against offending vessels; since the Act does not *destroy* existing third party rights, nothing need be said to preserve them. Section 33 was clearly inserted out of an abundance of caution. But should this section be viewed as vitally related to the problem at hand, it is equally clear that the third "person" referred to in this section embraces offending vessels. As

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7. The language referred to here is Section 5 of the Longshoremen's Act (33 U. S. C. Sec. 905), commonly referred to as the exclusivity clause, which the Court below considered as controlling (R. 18). The text of this section, as well as the text of the comparable section of the New York Workmen's Compensation Law, are set forth *infra* in Addendum A.

Mr. Justice Holmes so aptly pointed out,[8] the vessel is a *"living animated thing"* and a *"personality"* which possesses the attributes of an individual insofar as concerns her status in the law and the right to sue and to be sued. This principle was recognized in the earliest case arising after the passage of the Longshoremen's Act in which the employee's right to libel a vessel (not the property of the employer) was contested. *The Pacific Pine,* 31 F. 2d 152 (1929). As against the contention that the Act abolished the employee's rights against the vessel, the Court said (p. 155) "In the Longshoremen's and Harbor Workers' Compensation Act, there appears no such all-inclusive sweeping aside of old rights and remedies."[9]

This very Court in *Seas Shipping Co. v. Sieracki, supra,* where it was argued, inter alia, that the doctrine of unseaworthiness was not available to longshoremen because the Longshoremen's and Harbor Workers' Compensation Act afforded the exclusive remedy whether against the employer *or others,* had this to say:

> (328 U. S. at 101-102, 90 L. Ed. at 1109-1110) "The argument is that by giving longshoremen the rights of compensation afforded by that Act against the employer and making them exclusive, Congress has withdrawn from them not only the protections gained by virtue of the Merchant Marine Act of 1920 under the Haverty decision, *but also all other protections relating to personal injury which otherwise might be available to them under the maritime law.* In other words it is

8. "The Common Law", *supra*—pp. 26-27.

9. See also *Rederii v. Jarka Corporation,* 26 F. Supp. 304, 305:

> "Prior to the Act the longshoremen had a possible right of action against the vessel, against his immediate employer, or against anyone else claimed to be responsible for injuring him. The change in the law was not intended to reduce his rights but to enlarge them. The Pacific Pine, D. C. 31 F. 2d 152; Ross v. Jones, 89 U. S. 576, 22 Wall. 576, 22 L. Ed. 730."

claimed that the remedies afforded by the Longshoremen's legislation are *exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others.*

*"This view cannot be accepted. . . . the compelling answer is that Congress by that Act not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others, it expressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury. . . .*

"We may take it therefore that Congress intended the remedy of compensation to be exclusive against the employer. . . . But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. *The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone. . . ."* (Emphases supplied.)

Among the protections available to longshoremen under the maritime law, recognized by this Court in *Sieracki, supra,* as having been left intact by the right of election to proceed against third persons, is the longshoremen's right *to libel the offending vessel in rem;* this Court on that proposition cited with approval *The Pacific Pine, supra,* which held that *a ship is a "third person" whom the stevedore may elect to sue within the meaning of Section 33, supra, of the Longshoremen's Act* (*Seas Shipping Co. v. Sieracki, supra,* 328 U. S. at 102, footnote 21, 90 L. Ed. at 1110).

Nor may the decision below be sustained on a finding, not made by the Court below, that the ship is, within the meaning of the Longshoremen's Act, the petitioners' "employer" and therefore immune from suit. For the vessel is so much a separate and distinct juridical entity that this Court, in *Plamals v. Pinar Del Rio, supra,* 277 U. S. 151, refused to construe the term "employer," as used in the

Jones Act (46 U. S. C. A. Sec. 688), to encompass the *vessel* on which the injured seaman was there employed, and therefore refused to permit the seaman to proceed under the Jones Act against his vessel in rem, holding that the Act's creation of a right of action against the seaman's *employer* did not include a right of action against his *vessel;* this despite the established doctrine requiring the Jones Act to be liberally construed in favor of seamen (*Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 87 L. Ed. 239; *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, 83 L. Ed. 265). It inevitably follows that the destruction of the right to indemnity damages against the *employer* cannot include the existing right of action against the offending *vessel.*

**Conclusion.**

The decision below is directly opposed to a basic precept of statutory construction, namely, that the Longshoremen's Act is to be liberally construed in favor of the injured employee and his family. (*Bernatowicz v. Nacirema Operating Co.,* 142 F. 2d 385; *Southern S. S. Co. v. Norton,* 101 F. 2d 825).[10] It represents such a radical departure from all that the maritime law embodies and is so fundamentally at odds with first and basic principles of the maritime law, that it should not be allowed to stand without further and more penetrating analysis. It is based on the erroneous view that under the maritime law an action against a vessel is an action against its owner. This view literally uproots and overturns the entire concept of the ship's personality as a distinct juridical entity. That a shipowner, not otherwise personally liable, may indirectly be compelled to respond in damages because of the sale of his vessel on a maritime lien has never, until this day, been held to destroy the lien

10. The scope of this liberal policy is graphically illustrated in *Hitaffer v. Argonne Co.,* 183 F. 2d 811 (C. A. D. C.) cert. den. 71 S. Ct. 80, where, despite the exclusivity provisions of the Act, the Court sustained the right of an injured worker's wife to maintain a common law action against the employer for loss of consortium.

or to set up an immunity for the vessel. There are no decisions of this Court which so hold. Every decision of this Court which touches the question unqualifiedly points in the opposite direction.

The hard won principle of the *Sieracki* case, *supra,* which established the protective warranty of seaworthiness for longshore maritime workers, is at one stroke destroyed by the decision below, for it is not difficult for shipowners, (as exemplified by the very cases at bar) to so arrange their affairs that a direct employer-employee relationship will be established between them and their longshore workers.

The legislative intent which the Court below reads into the Longshoremen's Act is born of a common law approach to the basic issues. It stems from a failure to give full scope and recognition to the personification principle without which, as Mr. Justice Holmes so cogently demonstrates, certain areas of the maritime law, in fact consistent and rational and grounded in sound policy considerations, seem arbitrary and archaic. As a result the decision reached is judicial creation, without foundation. For if the vessel is not the seaman's employer within the meaning of the Jones Act, it is, with equal reason, not the stevedore's employer within the intendment of the Longshoremen's Act.

We respectfully submit that the decision below is clearly in conflict with those decisions of this Court which have had occasion to consider various aspects of the problem at hand. It involves the interpretation of important federal legislation touching the rights of longshore workers, not heretofore squarely ruled upon by this Court. The result reached below is in conflict with basic and firmly established features of the maritime law.

Wherefore, your petitioners respectfully pray that writs of certiorari issue to review the judgments below.

Respectfully submitted,

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Charles Lakatos,
*Counsel for Petitioners.*

## ADDENDUM A.

The Longshoremen's Act—33 U. S. C. A. Sec. 905:

"The liability of an employer prescribed in section 4 of this Chapter shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee . . . may elect to claim compensation under this Chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . ."

The New York Workmen's Compensation Law, 64, Part 1, McKinney's Consolidated Laws, Section 11:

"The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee . . . or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in Section 50 of the Chapter, an injured employee . . . may at his option, elect to claim compensation under this Chapter, or to maintain an action in the courts for damages on account of such injury; . . .".

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 553

BENJAMIN L. SMITH AND MICHAEL J. GAUL,
*Petitioners,*

*vs.*

STEAMSHIP "MORMACDALE" AND STEAMSHIP "ROBERT LUCKENBACH",
*Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


MARK D. ALCORN,
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*Of Counsel.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Brief in opposition to petition for writ of certiorari | 1 |
| Argument | 1 |
| The two court policy | 1 |
| There is no conflict | 2 |
| There is no constitutional question | 3 |
| Commentary upon the petition | 7 |
| Conclusion | 9 |


## Table of Cases Cited


| | |
|---|---|
| *Colvin* v. *Kokusai Kabushiki Kaisha*, 72 F. 2d 44 | 2 |
| *Crowell* v. *Benson*, 285 U.S. 282 | 3 |
| *Halcyon Lines, et al.* v. *Haenn Ship Ceiling and Refitting Corporation*, 342 U.S. 282 | 6 |
| *Rackus* v. *Moore-McCormack Lines, Incorporated*, 85 F. Supp. 185 | 2 |
| *Samuels* v. *Munson Steamship Lines*, 63 F. 2nd 861 | 2 |
| *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85 | 2 |
| *Smith, et al.* v. *Steamship "Mormacdale", et al.*, 99 F. Supp. 584, 198 F. 2nd 849 | 1 |
| *South Chicago Coal and Dock Company* v. *Bassett*, 309 U.S. 251 | 2 |
| *Swanson* v. *Marra Brothers, Incorporated*, 328 U.S. 1 | 2 |
| *United States* v. *Atlantic Mutual Insurance Company*, 343 U.S. 236 | 6 |
| *Vitozi* v. *The Steamship "Platano"*, 1950 A.M.C. 1686 | 2 |


## Statutes and Other Authorities Cited


| | |
|---|---|
| "Common Law" by Mr. Justice Holmes, Page 28 | 7 |

Page

Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, et seq., 44 Stat. 1424, et seq.):

Section 5 ..... 4, 6, 9
Section 7(d) ..... 5
Section 14 ..... 5
Section 17 ..... 5, 6
Section 33 ..... 6
Section 33(b) ..... 5
Section 36 ..... 5, 6
Section 37 ..... 5, 6
Section 38(b) ..... 5

United States Code Annotated, Title 33:

Section 901, et seq. ..... 3
Section 933 ..... 6

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STEAMSHIP "MORMACDALE" AND STEAMSHIP "ROBERT LUCKENBACH",
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

We think no detailed statement of the matter involved is required. The point for decision is set out in the opinion of the Court of Appeals for the Third Circuit (198 F. 2(d) 849; R. 17). The decision of the District Court is reported 99 F. Supp. 584, and appears in this record at page 6. It is supplemented by orders appearing at pages 8, 14 and 16.

## ARGUMENT

### The Two-Court Policy

The District Court and the Court of Appeals have reached the same result upon the same grounds. One Court dismissed the libers and the other affirmed that dismissal.

**There Is No Conflict**

The question which the petitioners ask this Court to decide has in practice been considered settled adversely to petitioners' claim for twenty years. It could not have arisen prior to 1927 when *The Longshoremen's and Harbor Workers' Compensation Act,* 33 U. S. C. A. 901, et seq., was passed. The same contention which the petitioners make was raised and rejected by the Court of Appeals for the Fifth Circuit in 1933 in the case of *Samuels* v. *Munson SS. Line,* 63 F. 2(d) 861. The question was again squarely raised and decided adversely to petitioners' contention in *Vitozi* v. *The SS. Platano,* 1950 A. M. C. 1686 (S. D. N. Y. not officially reported).

The reasoning and result reached by the Court in the *Samuels* case has been applied when the converse situation arose in *Colvin* v. *Kokusai Kisen Kabushiki Kaisha,* 72 F. 2(d) 44. The respondent attempted to defend a libel filed against it upon the ground that it was the employer of the deceased stevedore and therefore could not be "some other person" within the meaning of the Longshoremen's and Harbor Workers' Act. Similar reasoning has been expressed by this and other Courts.

*Swanson* v. *Marra Bros. Inc.,* 328 U. S. 1;
*Seas Shipping Company* v. *Sieracki,* 328 U. S. 85;
*South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251;
*Rackus* v. *Moore-McCormack Lines, Inc.,* 85 F. Supp. 185.

The petition does not even seriously contend that there is any conflict between the decision by the Court of Appeals for the Third Circuit and any decided case. What the petition does do is attempt to draw a completely unnatural metaphysical distinction between an employer and a piece

of property owned by the employer and thereafter attempts to create the appearance of conflict between the decision below and the language used by Mr. Justice Holmes where he was discussing an entirely different point.

**There is No Constitutional Question**

The petition is so cast as to give the inference that its author contends that the decision of the Court of Appeals in the case at bar raises a question as to "the constitutional validity of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, et seq. 33 U. S. C. § 901, et seq" (Petition, page 5). The same constitutional argument was made to the Court of Appeals in a petition for rehearing which was summarily denied by that Court.

This Court's decision in *Crowell* v. *Benson*, 285 U. S. 282, authoritatively settled the right of Congress to vary the incidents of liability imposed by the Maritime law. Speaking of the Longshoremen's and Harbor Workers' Act, this Court said:

> "As the act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. 3, § 2; Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128, 138, 50 S. Ct. 303, 74 L. Ed. 754), and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute."

In the same opinion this Court outlined the scope of the Federal power to alter and revise the Maritime law. It said:

> "In view of federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause

> of the Fifth Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable." 285 U. S. 22 at 41.

Unless it can be said that the interpretation which the Court of Appeals has placed upon the Longshoremen's and Harbor Workers' Act is unreasonable, then there is no constitutional question not heretofore decided against the petitioners by this Court's decision in *Crowell* v. *Benson*, *supra*. We turn then to examine the question whether the interpretation the Court of Appeals placed upon § 5 of the Longshoremen's and Harbor Workers' Compensation Act is so "unreasonable" as to make it unconstitutional.

§ 5 of the Act provides:

> "The liability of an employer prescribed in section 4 of this chapter shall be exclusive and in place of all other liability of such employer to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee * * * may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death."

We have been able to find no specific reference in the legislative history of the Act which would indicate that the specific problem now under consideration was brought to the attention of Congress at the time the Act was originally passed. We do find however that between its original passage and the present time the Act has been amended on eleven occasions. In all, changes have been made in various sections a total of 72 times but § 5 has never been touched. Surely, if the rule of the *Samuels* case did not express the will of Congress there has been ample oppor-

tunity to express the Congressional intent by amending § 5. Legislative intent can be expressed by inaction as well as by action.

If it was not the intent of Congress that stevedores in the situation of the petitioners should be relegated to their remedy under the Compensation Act and that that remedy should be exclusive, then various sections of the Act are inconsistent and illogical. § 7 (d) gives the employer paying compensation a cause of action against "such third party" to recover any amounts paid by the employer on account of medical treatment for the injured employee. If the petitioners' contention is correct, § 7 (d) gives an employer a cause of action against his own property *in rem*.

Under the petitioners' interpretation of their rights, § 14 of the Act would be at war with § 33 (b). § 14 is designed to insure prompt payment of compensation to alleviate the need which so frequently follows industrial injury. Under § 33 (b) an employer who contests his obligation to pay compensation and requires the injured employee to secure an *award* from the Deputy Commissioner thereby secures control of all litigation against a third party because this right is assigned to him by operation of law. Thus, in order to protect his property, the employer in a case such as the one at bar could force every injured employee to go before the Deputy Commissioner to obtain an award for compensation. Only thus could the employer protect himself from a suit against his property *in rem* at the hands of an employee to whom he had paid compensation *in personam*.

Contrary to the petitioners concept that they acquire a secret maritime lien against the respondent vessels are § 17, 36, 37 and 38 (b). If the intent of Congress had been that stevedores in the position of the petitioners here had acquired a lien against the vessel of their employer, then Congress should have exempted such cases from the provi-

sions of § 17 which creates a lien against all of the assets of the carrier or employer for such compensation.

It would be unnecessary to forbid the sale or transfer of property of the employer after injury to one of his employees if in fact the injured employee had the secret maritime lien against the vessel owned by his employer for which the petitioners here contend. In like manner the provisions of § 36 and 37 intended to insure payment of compensation in spite of insolvency or bankruptcy and securing payment of compensation by insuring such risks would not have been necessary in the case where a vessel owner was the direct employer of the stevedores working on board his ships.

The present case is a frank attempt to bring about judicial amendment of § 5 of the Compensation Act in those instances where a Steamship Company performs the stevedoring operations on board its own vessels through its own employees. This Court has but recently condemned judicial legislation. *Halcyon Lines, et al.* v. *Haenn Ship Ceiling and Refitting Corporation,* 342 U. S. 282; and *United States* v. *Atlantic Mutual Insurance Co.,* 343 U. S. 236.

We concede that § 33 of the Act grants an injured stevedore a right to elect to hold liable "some person other than the employer" who may be responsible to him in damages under principles of admiralty law or the common law. If the employee is successful he reimburses his employer and it is a *pro tanto* satisfaction of any future compensation due. 33 U. S. C. A. 933. If his suit against the third person is unsuccessful he may still claim compensation against his employer. In practice, the result for which these petitioners contend would require the employer, because he is a vessel owner, to either pay in full any judgment his employee might obtain against him in such an action or suffer the sale and consequent loss of his own vessel because of an injury to one of his own employees. The employer is

given control of the claim by reason of having paid compensation under an award. The "right" to bring suit *in rem* against his own property is then assigned to him by operation of law. The spectacle of the shipowner *qua* employer suing the vessel he owns *qua* shipowner to recover the compensation he has paid *qua* employer is sufficient answer to petitioners argument.

It is obvious from a study of the petition that this case is an attempt to force this or some other Court into a decision which will say that a stevedore employed as were the petitioners here and injured on board a vessel owned and operated by the same Company which employed them, are employees of the vessel. It will then be contended in some later case that they are within the purvue of the maritime doctrine of maintenance and cure, the Jones Act, and various other remedies with respect to wages, etc. which the Courts and the legislature have granted to seamen who are members of the crew of a vessel; for it is only a step to that point once it has been established that a stevedore is a seaman, *Seas Shipping Company* v. *Sieracki, supra,* and employed by the vessel upon which he happens to be working.

**Commentary upon the Petition**

The main thrust of the petition is built around quotations from *The Common Law* by Mr. Justice Holmes. As is true of so many quotations which are used to form a basis of a logistic syllogism, the statement which is the premise must be afforded its full and true meaning. The petitioners ignore Holmes' statement [1]:

> "The ship is the only security available in dealing with foreigners and rather than send one's own citizens to search for a remedy abroad in strange Courts it is easy to seize the vessel and satisfy the claim at

[1] Page 28 of The Common Law.

home, leaving the foreign owners to get their indemnity as they may be able."

The petitioners do not refer to the conclusions which Holmes draws following his outline of the development of admiralty practice from which they quote so freely.

"The foregoing history, apart from the purposes for which it has been given, well illustrates the paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.

On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that

they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

**Conclusion**

The Court of Appeals has held that § 5 of the Longshoremen's Act was intended to afford the exclusive remedy to these petitioners. It has said that to impose the additional burden of liability *in rem* against vessels owned by the employer would radically distort the intent of Congress. That conclusion is correct. It has been accepted in practice for many years and there is no conflict among the inferior Courts on the subject.

The case does not merit decision in this Court and the writ prayed for should be denied.

Respectfully submitted,

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